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10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE DISTRICT OF ARIZONA  
12 TUCSON DIVISION  
13  
14

15 WILDEARTH GUARDIANS,

16 Plaintiff,

17 vs.

18 UNITED STATES FISH AND WILDLIFE  
19 SERVICE and UNITED STATES FOREST  
20 SERVICE,

21 Defendants.  
22  
23  
24  
25  
26  
27  
28

No. 13-151-RCC

**PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT**

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## I. INTRODUCTION

This Endangered Species Act (“ESA”) lawsuit concerns the continuing failures of Defendants U.S. Fish and Wildlife Service (“FWS”) and U.S. Forest Service (“USFS”) to comply with their procedural and substantive duties under the ESA to conserve and recover the Mexican spotted owl (“MSO”) on national forest lands in Arizona and New Mexico. In a nutshell, Plaintiff WildEarth Guardians (“Guardians”) will show in this ESA lawsuit that the USFS has a long and continuing history of failing to implement the “adaptive management” approach that it adopted to comply with its ESA obligations in connection with the MSO. Guardians will further show that the FWS overlooks this ongoing failure with a wink and a nod, to the continuing detriment of the MSO.

Together, the USFS and the FWS indulge in the fiction that the USFS is “continuing” to implement the adaptive management approach prescribed by the “1996 Standards and Guidelines” – the Forest Plan<sup>1</sup> document that guides and constrains USFS management actions to promote MSO conservation and recovery. However, the undisputed evidence in the Administrative Records lodged by the Federal Defendants in this case show that the so-called “continuing” implementation is a sham: both the USFS and the FWS admit that the USFS has *not* implemented the 1996 Standards and Guidelines in the *past*, and that the USFS will *not* implement the 1996 Standards and Guidelines in the *future*. In this regard, the 2012 Biological Opinions that Guardians challenges in this lawsuit are “little more than an analytical sleight of hand” which manipulate evidence and data “to achieve a ‘no jeopardy’ finding.” *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917, 933 (9<sup>th</sup> Cir. 2008).

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<sup>1</sup> Pursuant to the National Forest Management Act, each national forest is governed by a Forest Plan – otherwise known as a Land and Resource Management Plan, or “LRMP.” All site-specific management actions that the USFS conducts in any national forest – such as timber harvest and grazing authorizations – must be “consistent” with the governing Forest Plan. 16 U.S.C. §1604(i), *see Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1052 (9<sup>th</sup> Cir. 1994).

## II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

### A. Summary of the factual context of this dispute

In 1993, the MSO was listed as a threatened species in need of the protections of the Endangered Species Act (“ESA”). Statement of Facts (“SOF”) at ¶ 1. Since the time that the MSO was listed as a threatened species, the species’ population has continued to decline. SOF ¶¶ 84-91. In fact, MSO experts determined in 2000 that its population had decreased post-listing by more than 30% in the national forests of Arizona and New Mexico, with population declines as high as 40% in New Mexico national forests. SOF ¶ 87. More recently, the FWS admitted that most populations of MSO have declined in the recent past, and are continuing to decline. SOF ¶ 85-86.

Over this same period of time – since the listing of the MSO as a threatened species in 1993 – there has been a widely acknowledged institutional failure on the part of FWS and USFS to develop critical information on the impacts of various USFS timber management practices on the MSO.<sup>2</sup> SOF ¶ 67. The FWS admits that “[u]nfortunately, empirical data on the effects of thinning and other mechanical forest treatments on Mexican spotted owls are nonexistent,” and that “[a]lthough this has been clearly noted for years, no studies on this topic have been funded to date.” *Id.* Alarming, the FWS went on to state that extrapolations from studies of other subspecies of spotted owls “suggest that at least some kinds of mechanical forest treatments may negatively affect spotted owls.” *Id.* However, even as the population of Mexican spotted owls continued to plunge in the years following its ESA listing, and even as studies of other spotted owl subspecies indicated that USFS timber management practices “negatively affect spotted owls,” the FWS and the USFS knowingly (1) neglected to conduct any studies to assess how on-going USFS timber management activities in Arizona and New Mexico affect the

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The impacts of USFS management actions on the MSO are particularly important to the species’ survival and recovery because the vast majority of Mexican spotted owls reside on national forest lands in Arizona and New Mexico. SOF ¶¶ 2-4.



1 survival and recovery of the MSO and (2) neglected to conduct rigorous MSO population  
2 trend monitoring.

3 **B. Past litigation against the FWS and the USFS for violations of the ESA**  
4 **in connection with MSO management**

5 Twenty years ago, Judge Muecke of the United States District Court for the District of  
6 Arizona found that the USFS violated its ESA Section 7(a)(2) duty to conserve the MSO because  
7 it managed the eleven national forests in Arizona and New Mexico pursuant to Forest Plans  
8 which had never been the subject of a programmatic ESA Section 7(a)(2) “formal consultation”  
9 with the FWS as to the effects of those Forest Plans on the MSO. *Silver v. Thomas*, 924 F.Supp.  
10 976, 984-85 (D.Ariz. 1995). In that case, the USFS argued that its then on-going ESA Section  
11 7(a)(2) consultation with the FWS over expected amendments to the Arizona and New Mexico  
12 Forest Plans (which were not yet complete at that time) excused its obligation to comply with its  
13 ESA Section 7(a)(2) obligations in connection with implementation of the *actual* and *on-going*  
14 Forest Plans. *Id.* Judge Muecke disagreed and held that the USFS’s obligation under ESA  
15 Section 7(a)(2) is to consult with the FWS on the impacts of the MSO conservation approach that  
16 it *actually* implements – and not on some hypothetical or aspirational conservation approach  
17 which it might implement in the future. *Id.* at 985 (a consultation as to an action that the USFS  
18 might implement in the future “has no bearing on the ongoing activities that affect the MSO”).

19 Ever since Judge Muecke issued that first judicial order aimed at bringing the  
20 USFS into compliance with its ESA obligations in connection with the MSO, the USFS  
21 has been recurrently brought to heel by the courts for failure to abide by its own MSO  
22 management strategy. For example, in *Center for Biological Diversity v. Norton*, 240  
23 F.Supp.2d 1090, 1094 (D. Ariz. 2003), Judge Bury discussed that the USFS’s MSO  
24 management guidelines “have either not been implemented at all or have been  
25 implemented improperly” and concluded that “the history behind [the USFS’s] Forest  
26 Plans . . . evidences [the USFS’s] own disregard of court orders and the ESA.” *Id.* at  
27 1094, 1096.

28 Likewise, in 2006 the Ninth Circuit found that the USFS violated the ESA when it

1 failed to implement a critical MSO monitoring plan which it had committed to implement  
2 during the course of an ESA Section 7(a)(2) consultation as to the impacts on the MSO of  
3 the USFS's grazing management strategy. *Forest Guardians v. Johanns*, 450 F.3d 455  
4 (9<sup>th</sup> Cir. 2006). The Ninth Circuit found that the FWS's analysis for purposes of the  
5 consultation was specifically premised on the USFS's firm commitment to implement a  
6 program of monitoring forage conditions. The USFS's subsequent failure to implement  
7 the promised monitoring plan vitiated and fatally flawed the FWS's analysis and  
8 conclusions, and constituted a violation of the ESA. *Id.* at 463-67.<sup>3</sup>

9 More recently, in *Center for Biological Diversity v. U.S. Forest Service*, 820  
10 F.Supp.2d 1029 (D. Ariz. 2011), Judge Bury ruled that the USFS's failure to monitor  
11 MSO population trends in Arizona and New Mexico – as specifically required by the  
12 FWS's 2005 Biological Opinion assessing the MSO impacts of the USFS's timber  
13 management activities – constituted a violation of the ESA in numerous respects:

14 The [USFS's] failure to monitor constitutes a failure to conserve these  
15 species pursuant to section 7(a)(1) of the ESA. By failing to monitor, and  
16 by exceeding or not knowing whether it is exceeding the incidental take  
17 limit, the FS is failing to insure that implementation of forest plans in the  
18 FS' Southwest Region is not likely to jeopardize the existence of listed  
19 species pursuant to section 7(a)(2). Additionally, failure to monitor  
20 constitutes new information and a change to the proposed action that will  
affect these species in ways not considered in the [Biological Opinion], and  
the failure to immediately reinstate and complete consultation regarding the  
implementation of forest plans also violates the ESA. 50 C.F.R. § 402.16.  
Finally, the FS is failing to comply with its non-discretionary obligations for  
threatened and endangered species in the Southwest Region under the ESA.  
16 U.S.C. § 1540(g).

21 *Id.* at 1034 *see also WildEarth Guardians v. U.S. Forest Service*, Civil No. 10-385 (D.  
22 Ariz. 2011) (January 5, 2012 Order) [Docket #86] (the USFS's failure to conduct MSO

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24 Similarly, in *Forest Guardians v. U.S. Forest Service*, Civil No. 00-490 (D.N.M.  
25 2003) (April 14, 2003 Memorandum Opinion and Order) [Docket #285], the court found  
26 that the USFS's failure to comply with programmatic monitoring requirements intended  
27 to protect and conserve the MSO violated ESA Section 7 and in *Southwest Center for*  
28 *Biological Diversity v. Department of Interior*, Civil No. 99-519 (D.N.M. 2000) (March  
13, 2000 Memorandum Opinion and Order) [Docket #33] the court found “years of delay  
relating to FWS’ compliance obligations” in connection with conservation of the MSO.

1 population monitoring constitutes a violation of the ESA).

2 In this case, Guardians will show that the USFS's and the FWS's lamentable  
3 record with respect to ESA compliance and the MSO continues. In theory, the USFS and  
4 the FWS have adopted an "adaptive management" approach towards MSO conservation.  
5 SOF ¶¶ 8-11, 17-21. This "adaptive management" approach – embodied in the 1995  
6 MSO Recovery Plan and in the 1996 Standards and Guidelines that the USFS  
7 incorporated into each of the Arizona and New Mexico Forest Plans – is premised on  
8 rigorous MSO population monitoring, cause-and-effect experiments, and the  
9 implementation of protective management recommendations. SOF ¶¶ 12-16, 21. The  
10 evidence in this case clearly shows that the Federal Defendants have failed to comply  
11 with each of these critical components of the adaptive management plan. Both the USFS  
12 and the FWS have acknowledged these failures. SOF ¶¶ 28-32, 37-42, 65-67, 69-75.

### 13 **III. THE SUBSTANTIVE AND PROCEDURAL REQUIREMENTS OF THE ESA**

14 The ESA is "the most comprehensive legislation for the preservation of  
15 endangered species ever enacted by any nation." *Tennessee Valley Authority v. Hill*, 98  
16 S.Ct. 2279, 2295 (1978). Based upon its review of the ESA's language, history, and  
17 structure, the United States Supreme Court holds that "Congress intended endangered  
18 species to be afforded the highest of priorities" in an effort to "halt and reverse the trend  
19 towards species extinction, whatever the cost." *Id.* at 2292, 2297. The Ninth Circuit  
20 holds that the ESA reflects a policy of "institutionalized caution," and that the statutory  
21 scheme and its implementation are intended to "give the benefit of the doubt to preserving  
22 endangered species." *Arizona Cattle Growers' Association v. Salazar*, 606 F.3d 1160,  
23 1166-67 (9<sup>th</sup> Cir. 2010).

24 In pursuit of its lofty goals, the ESA imposes both substantive and procedural  
25 duties on federal agencies. *Conservation Congress v. Finley*, 774 F.3d 611, 615 (9<sup>th</sup> Cir.  
26 2014). Three of those substantive duties imposed upon agencies are at issue in this case:  
27 (1) the Section 7(a)(1) duty to "utilize their authorities to further the purpose of . . .  
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1 conservation, 16 U.S.C § 1536(a)(1), (2) the Section 7(a)(2) duty to “insure that any  
2 action [implemented by the agency] is not likely to jeopardize the continued existence of  
3 [a listed species] or result in the destruction or adverse modification” of critical habitat,  
4 16 U.S.C. § 1536 (a)(2), and (3) and the Section 9 duty to avoid “take” of listed species  
5 except in certain limited circumstances discussed further below,<sup>4</sup> 16 U.S.C. § 1538.

6 “Conservation,” “jeopardize,” and “adversely modify” are all terms of art under  
7 the ESA. “Conservation” is defined as the “use of all methods and procedures which are  
8 necessary to bring any endangered species or threatened species to the point at which the  
9 measures provided pursuant to this chapter are no longer necessary.” 16 U.S.C. §  
10 1532(3). “Jeopardize” and “adversely modify” have been construed by the Ninth Circuit  
11 to encompass a “recovery standard.” *National Wildlife Federation*, 524 F.3d at 931-32,  
12 *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1069-71 (9<sup>th</sup>  
13 Cir. 2004). That is, any federal action that impairs a species’ prospects for recovery – and  
14 not just its survival – “jeopardizes” the species or “adversely modifies” its habitat within  
15 the meaning of the ESA. Thus, the three substantive duties discussed above work  
16 together to assure that actions taken by federal agencies promote the survival and  
17 recovery of listed species.

18 To assure that agencies comply with their ESA substantive duties, the ESA also  
19 imposes procedural duties upon federal agencies. A federal agency proposing to take  
20 action must assess whether implementation of that action may affect threatened or  
21 endangered species. If there is “no effect,” that is the end of the matter. If the action  
22 agency determines that its proposed action “may affect” protected species or their  
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24 <sup>4</sup>

25 For purposes of the ESA, “take” means not only killing or injuring the listed  
26 species, but also “harm.” 16 U.S.C. § 1532(19). “Harm” includes “significant habitat  
27 modification or degradation where it actually kills or injures wildlife by significantly  
28 impairing essential behavioral patterns, including breeding, feeding, or sheltering.”  
*Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S.Ct. 2407,  
2412 (1995).

1 designated critical habitat, it must commence a “formal consultation” with the FWS  
2 pursuant to ESA Section 7(a)(2) to determine whether the action would jeopardize a listed  
3 species or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2), 50 C.F.R. §  
4 402.14(a). An ESA Section 7(a)(2) formal consultation is commenced by the action  
5 agency’s written request to the FWS which must include certain key information  
6 assembled by the action agency, including a Biological Assessment which describes the  
7 proposed action and the agency’s evaluation of its potential effects on listed species and  
8 their designated critical habitats. 16 U.S.C. § 1536(c)(1), 50 C.F.R. § 402.14(c).

9 An ESA Section 7(a)(2) formal consultation is concluded with the FWS’s issuance  
10 of a Biological Opinion. 16 U.S.C. § 1536(b). In a Biological Opinion, the FWS  
11 determines whether the proposed action, together with the cumulative effects of other  
12 actions affecting the species, is likely to jeopardize a listed species or adversely modify a  
13 listed species’ critical habitat. 50 C.F.R. § 402.14(g)(4). If the FWS finds that a  
14 proposed action is associated with a jeopardy or adverse modification effect, the FWS  
15 must develop and propose implementation of a Reasonable and Prudent Alternative  
16 which is a proposal to modify the proposed action – within the constraints of the action  
17 agency’s authority – in such a way as to avoid jeopardy and adverse modification. 16  
18 U.S.C. § 1536(b)(3)(A).

19 If, during the course of formal consultation, the FWS concludes that the proposed  
20 action might result in the “incidental take” of listed species that would be otherwise  
21 prohibited by the take prohibition of ESA Section 9, the Biological Opinion must include  
22 an Incidental Take Statement. 16 U.S.C. § 1536(b)(3). An Incidental Take Statement  
23 acts as an exemption from the ESA’s Section 9 take prohibition and (1) specifies the  
24 amount of incidental take authorized; (2) specifies Reasonable and Prudent Measures  
25 (“RPMs”) to minimize the impact of such incidental take; and (3) sets forth the Terms  
26 and Conditions (T&Cs”) that the action agency must comply with to implement the  
27 RPMs. 50 C.F.R. §§ 402.14(i)(1)(i), (ii), (iv). So long as – and only so long as – the  
28

1 action agency complies with the RPMs and the T&Cs of an Incidental Take Statement,  
2 the agency is exempt from the take prohibition of the ESA in connection with its  
3 implementation of the action. 16 U.S.C. § 1536(o).

4 After having completed a formal consultation with the FWS, an action agency is  
5 obligated to re-initiate formal consultation under certain circumstances. 50 C.F.R. §  
6 402.16. Re-initiation of formal consultation is required if the amount of take authorized  
7 in an ITS is exceeded or if the agency action analyzed in a Biological Opinion is  
8 “subsequently modified in a manner that causes an effect to the listed species or critical  
9 habitat that was not considered in the biological opinion.” 50 C.F.R. §§ 402.16(a), ©.

#### 10 IV. STANDING

11 Attached to this Motion for Summary Judgment as Exhibits 1 and 2 are  
12 declarations of Guardians members in support of Guardians’ standing in this case. These  
13 declarations establish the requirements of standing as set out in *Cottonwood*  
14 *Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075 (9<sup>th</sup> Cir. 2015).

#### 15 V. STANDARD OF REVIEW

16 The Administrative Procedure Act governs review of agency decisions under the  
17 ESA. *Center for Biological Diversity v. U.S. Bureau of Land Management*, 698 F.3d  
18 1101, 1109 (9<sup>th</sup> Cir. 2012). Pursuant to this standard, an agency action is arbitrary and  
19 capricious if the agency:

20 relied on factors which Congress has not intended it to consider, entirely  
21 failed to consider an important aspect of the problem, offered an  
22 explanation for its decision that runs counter to the evidence before the  
agency, or is so implausible that it could not be ascribed to a difference in  
view or the product of agency expertise.

23 *Id. citing Motor Vehicle Manufacturers Association v. State Farm*, 463 U.S. 29, 43, 103  
24 S.Ct. 2856 (1983).

25 “Although the arbitrary and capricious standard of review is a ‘narrow one,’ [a  
26 court reviewing agency action is] required to ‘engage in a substantial inquiry, . . . a  
27 thorough probing review.’” *Native Ecosystems Council v. U.S. Forest Service*, 418 F.3d  
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1 953, 960 (9<sup>th</sup> Cir. 2005) *quoting Citizens to Preserve Overton Park, Inc. v. Volpe*, 401  
2 U.S. 402, 415-16, 91 S.Ct. 814 (1971). “To have not acted in an arbitrary and capricious  
3 manner, the agency must present ‘a rational connection between the facts found and the  
4 conclusions made.’” 418 F.3d at 960 *quoting National Wildlife Federation v. U.S. Army*  
5 *Corps of Engineers*, 384 F.3d 1163, 1170 (9<sup>th</sup> Cir. 2004). A reviewing court “‘may not  
6 defer to an agency decision that is without a substantial basis in fact’ and cannot uphold a  
7 decision based on a ‘clear error of judgment.’” 418 F.3d at 960 *quoting Sierra Club v.*  
8 *U.S.E.P.A.*, 346 F.3d 955, 961 (9<sup>th</sup> Cir. 2003).

9 An important considerations guides and constrains the court’s application of the  
10 arbitrary and capricious standard of review in the context of an ESA action. In light of  
11 the “institutionalized caution” required by the ESA, the FWS may not base its ESA  
12 compliance actions “on speculation or surmise.” *Building Industry Association of*  
13 *Superior California v. Norton*, 247 F.3d 1241, 1247-48 (D.C. Cir. 2001) *citing Bennett v.*  
14 *Spear*, 117 S.Ct. 1154, 1168 (1997). Accordingly, the FWS is required to use “the best  
15 available scientific and commercial data available” in its preparation of Biological  
16 Opinions. 16 U.S.C. § 1536(a)(2). This requirement “prohibits an agency from  
17 disregarding available scientific evidence that is in some way better than the evidence it  
18 relies on.” *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 602 (9<sup>th</sup>  
19 Cir. 2014).

## 20 **VI. THE 2012 BIOLOGICAL OPINIONS ARE ARBITRARY AND CAPRICIOUS**

21 The Biological Opinions at issue in this lawsuit are the 2012 forest-wide  
22 Biological Opinions issued by the FWS in connection with the MSO. SOF § 44. In its  
23 First Claim for Relief, Guardians contends that the FWS’s 2012 Biological Opinions are  
24 arbitrary and capricious for the following reasons.

### 25 **A. The FWS’s 2012 Biological Opinions indulge in and are premised on an** 26 **irrational fiction: the notion that the USFS has implemented and will** **continue to implement the 1996 Standards and Guidelines**

27 After the MSO was listed as a threatened species in need of the protections of the  
28

1 ESA, the FWS set to work to develop a Recovery Plan for the species. SOF ¶¶ 5-6. The  
2 core purposes of the MSO Recovery Plan were to describe the future management actions  
3 believed to be necessary for the survival and recovery of the MSO. SOF ¶ 7. In light of  
4 the fact that there were many scientific uncertainties as to the population status of the  
5 species and the impacts of USFS timber management practices on the species, the FWS's  
6 Recovery Plan recommended an "adaptive management"<sup>5</sup> approach to MSO conservation.  
7 SOF ¶¶ 8-17. The 1995 MSO Recovery Plan stressed – emphatically – that monitoring  
8 MSO population trends was an indispensable component of the adaptive management  
9 approach. SOF ¶¶ 12, 14-17.

10 In 1996, the USFS amended all eleven of the Forest Plans for Arizona and New  
11 Mexico national forests to incorporate the adaptive management approach and  
12 recommendations of the 1995 MSO Recovery Plan. SOF ¶¶ 18-19. These amendments,  
13 which were adopted to guide and constrain the USFS in its ESA compliance with respect  
14 to the MSO, are known as the "1996 Standards and Guidelines" and they applied to all  
15 eleven national forests in Arizona and New Mexico. While the provisions of the  
16 Recovery Plan itself were merely guidance to – and not binding on – the USFS, the  
17 incorporation of the Recovery Plan's provisions into the USFS's Forest Plans for the  
18 Arizona and New Mexico national forests (as the 1996 Standards and Guidelines)  
19 rendered those provisions binding on the USFS. SOF ¶ 20 *see also* footnote 1 above. By  
20 adopting the 1996 Standards and Guidelines, the USFS committed itself to  
21 implementation of the Recovery Plan's monitoring components and to implementation of  
22 the Recovery Plan's recommendations for timber management activities. SOF ¶¶ 20-22.

23 As required by Section 7(a)(2) of the ESA, the USFS and the FWS engaged in a  
24

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25 <sup>5</sup>

26 "Adaptive management" is "[a] deliberate and iterative process to optimize  
27 management" that "entails formation of a management model, management  
28 implementation, monitoring and interpretation of system responses, and ultimately  
refinement of management model given lessons learned." SOF ¶ 11.



1 Section 7(a)(2) formal consultation as to the expected impacts on the MSO of  
2 implementing the 1996 Standards and Guidelines. That Section 7(a)(2) consultation led  
3 to the FWS's issuance of a 1996 Biological Opinion on "the implementation of amended  
4 standards and guidelines for the Mexican spotted owl." SOF ¶ 25. This Biological  
5 Opinion was a "no jeopardy" Biological Opinion. That is, the FWS determined that  
6 implementation of the 1996 Standards and Guidelines would not jeopardize the continued  
7 existence of the MSO. *Id.* The "no jeopardy" conclusion was specifically and expressly  
8 premised on the FWS's assumption that the USFS would implement all aspects of the  
9 adaptive management scheme that were embodied in the 1996 Standards and Guidelines.  
10 SOF ¶¶ 25-26.

11 Within a matter of years, it became apparent that the USFS would not implement  
12 all aspects of the 1996 Standards and Guidelines, contrary to the assumptions that formed  
13 the basis of the FWS's 1996 Biological Opinion. SOF ¶ 28. Amongst other excursions  
14 beyond the boundaries of the binding 1996 Standards and Guidelines, the USFS did not  
15 implement the crucial population monitoring component of the 1996 Standards and  
16 Guidelines because of funding issues. SOF ¶ 28-30, 69-73.

17 To address the USFS's failure to implement the 1996 Standards and Guidelines,  
18 and also because the USFS exceeded the amount of incidental take authorized by the  
19 1996 Biological Opinion, the USFS and the FWS re-initiated Section 7(a)(2) consultation  
20 as to the impacts of the USFS's timber management activities on the MSO. SOF ¶¶ 31-  
21 34. This re-initiated consultation led to the FWS's issuance of the 2005 Biological  
22 Opinion analyzing "the continued implementation" of the 1996 Standards and Guidelines,  
23 despite the fact that those Standards and Guidelines were *not* being implemented at that  
24 time. SOF ¶ 34. Like the 1996 Biological Opinion which it replaced, the 2005 Biological  
25 Opinion was a "no jeopardy" Biological Opinion that was specifically and expressly  
26 premised on the FWS's assumption that the USFS would implement all aspects of the  
27 1995 MSO Recovery Plan's adaptive management approach, as that approach had been  
28

1 incorporated into the Arizona and New Mexico Forest Plans by the 1996 Standards and  
2 Guidelines. SOF ¶¶ 35-36. However, by the time that the 2005 was issued, it was already  
3 well known to the FWS that the USFS was *not* implementing all aspects of the 1996  
4 Standards and Guidelines, including the crucial population monitoring component. SOF  
5 ¶¶ 28-32. Thus, the FWS’s issuance of the 2005 Biological Opinion – which nominally  
6 analyzed the USFS’s *continuing* implementation of the 1996 Standards and Guidelines –  
7 was based on an irrational foundational assumption: the fictional notion that the USFS  
8 was *actually* implementing the 1996 Standards and Guidelines.

9       Sure enough, the FWS was soon forced to admit – contrary to its stated  
10 assumptions in the 2005 Biological Opinion – that the USFS continued to manage its  
11 timber program outside the boundaries and constraints of the supposedly binding 1996  
12 Standards and Guidelines. Specifically, the FWS acknowledged that the USFS was not  
13 conducting the required population monitoring and that the USFS was not applying the  
14 specific management recommendations set out in the 1996 Standard and Guidelines. SOF  
15 ¶¶ 37-42. Indeed, in at least one instance, the FWS informed the USFS that its overly  
16 intensive timber management practices – and *not* the threat of wildland fire – constituted  
17 “the largest threat to the MSO.” SOF ¶ 41.

18       Accordingly, the USFS and the FWS re-initiated – once again – a Section 7(a)(2)  
19 consultation as to the impacts on the MSO of the USFS’s timber management practices.  
20 The re-initiated consultation led to the FWS’s issuance of the 2012 Biological Opinions  
21 that are at issue in this lawsuit. The FWS states – once again, and still irrationally – that  
22 the specific action that is the subject of as the 2012 Biological Opinions is “continued  
23 implementation” of the 1996 Standards and Guidelines. SOF ¶¶ 43-45. Like the 1996  
24 and the 2005 Biological Opinions, the 2012 Biological Opinions are all “no jeopardy”  
25 opinions that are specifically and expressly premised on the FWS’s irrational assumption  
26 that the USFS will implement all aspects of the 1996 Standards and Guidelines. SOF ¶  
27 45. However, it cannot be disputed that by the time that the 2012 Biological Opinions  
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1 were issued, it was plainly apparent to the USFS and the FWS that the USFS was *not*  
2 implementing the 1996 Standards and Guidelines. SOF ¶¶ 37-42.

3       The FWS’s arbitrary and capricious issuance of the 2012 Biological Opinions on a  
4 USFS management action that was not taking place is doubly problematic because the  
5 FWS was aware – at the time that it issued the 2012 Biological Opinions – that the USFS  
6 would continue to operate its timber management program outside of the boundaries set  
7 by the 1996 Standards and Guidelines’ adaptive management program. In this  
8 connection, a 2013 letter from FWS to USFS acknowledges that the population trend  
9 monitoring required by the 1995 MSO Recovery Plan and the 1996 Standards and  
10 Guidelines had not been implemented, and would not be implemented. SOF ¶ 75.  
11 Instead, this letter suggests, agency biologists had “begun discussions” as to how to  
12 acquire crucial MSO population trend information in another way. *Id.* However, the  
13 relevant and dispositive fact is that, at the time that the 2012 Biological Opinions were  
14 issued, there were *no plans at all* for acquisition of basic MSO population trend data.  
15 Therefore, any claim that the USFS has implemented, or continues to implement, an  
16 adaptive management approach to MSO conservation and recovery is pure fiction.

17       The Ninth Circuit has made it abundantly clear – time and time again – that an  
18 agency cannot engage the FWS in an ESA Section 7(a)(2) consultation with respect to  
19 one proposed action, but then proceed to implement a different action with potentially  
20 different effects. “[I]f an agency fails to implement key assumptions on which a  
21 [Biological Opinion] was based, the agency is required to re-initiate consultation with the  
22 FWS under the ESA.” *Forest Guardians v. U.S. Forest Service*, 329 F.3d 1089, 1095 (9<sup>th</sup>  
23 Cir. 2003). This principle was first articulated by the Ninth Circuit in *Sierra Club v.*  
24 *Marsh*, where the FWS issued a no-jeopardy Biological Opinion in connection with a  
25 proposed action based upon the action agency’s commitment to implement certain  
26 mitigation measures in connection with the action. 816 F.2d 1376 (9<sup>th</sup> Cir. 1987). The  
27 Ninth Circuit held that the action agency’s subsequent failure to implement its mitigation  
28

1 commitments vitiated the analysis, the conclusions, and the legal effect of the Biological  
2 Opinion. *Id.* at 1384-89.

3       The Ninth Circuit applied this same principle in the a case which is very similar to  
4 this case. *Forest Guardians v. Johanns*, 450 F.3d 455 (9<sup>th</sup> Cir. 2006). In *Johanns*, the  
5 USFS conducted an ESA Section 7(a)(2) consultation with the FWS as to the effects of  
6 the USFS Region 3 grazing guidelines on MSOs and MSO habitat. During that  
7 consultation, the USFS committed to implement certain “guidance criteria” in connection  
8 with livestock grazing on national forest lands, including specified monitoring activities.  
9 *Id.* at 459-60. Based on that commitment, the FWS concurred in the USFS’s “not likely  
10 to adversely affect” determinations, and the consultation terminated as an “informal  
11 consultation.” Subsequently, the USFS developed a “practice of not complying with the  
12 monitoring requirements.” *Id.* at 462. The Ninth Circuit found that implementation of  
13 the monitoring requirements was a fundamental and essential component of the “action”  
14 which had been the subject of the Section 7(a)(2) consultation, and that the USFS’s  
15 subsequent failure to follow through on its monitoring commitments vitiated the analysis  
16 and the conclusions of the consultation:

17           The material inadequacy of the Forest Service’s utilization monitoring and  
18           the results of the limited measurements that were taken constituted  
19           modifications to the allotment’s land management plan [as analyzed during  
          the previous consultation] that affected listed species in a manner and to an  
          extent not previously considered.

20 *Id.* at 464-66. Accordingly, the Ninth Circuit held that the USFS violated ESA Section 7  
21 and had a legal obligation to conduct a “reality-based” consultation with the FWS by re-  
22 initiating consultation with the FWS as to the effects of the action it *actually*  
23 implemented. *Id.*

24       Since *Johanns*, other courts have found ESA Section 7(a)(2) violations in similar  
25 circumstances where the action agency implements an action which is materially different  
26 from the action which it committed to implement during the course of an ESA Section  
27 7(a)(2) consultation. For example, in *Oregon Natural Desert Association v. Tidwell*, 716  
28

1 F.Supp.2d 982 (D.Ore. 2010), the USFS made monitoring commitments to the FWS in  
2 connection with an ESA Section 7(a)(2) formal consultation as to the effects of Forest  
3 Plan implementation on threatened steelhead trout, but then subsequently failed to comply  
4 with its monitoring commitments. The court held that the USFS's failure to conduct the  
5 required monitoring constituted a violation of ESA Section 7(a)(2) since the Biological  
6 Opinion's no jeopardy conclusion was premised on the USFS's compliance with its  
7 monitoring commitment:

8       The Forest Service may not make empty promises, secure a no jeopardy  
9       [Biological Opinion], and then go forward with a proposed action – absent  
10       the monitoring and enforcement promised – simply because a no jeopardy  
11       [Biological Opinion] has issued . . . The buck must stop somewhere. Here,  
the Forest Service acted arbitrarily and capriciously and failed to fulfill its  
duties under §7(a)(2) by issuing grazing authorizations . . . on a [Biological  
Opinion] it knew was based on inaccurate information.

12 *Id.* at 1004, *see also Center for Biological Diversity*, 698 F.3d at 1109-10, 1117

13 (Biological Opinion premised on FWS's assumption that an action will take place "is  
14 inconsistent with the [ESA], and . . . is therefore invalid"), *American Rivers v. U.S. Army*  
15 *Corps of Engineers*, 271 F.Supp.2d 230, 252-54 (D.D.C. 2003) (invalidating a Biological  
16 Opinion because plaintiffs established that the federal action analyzed in the opinion was  
17 "virtually certain not to occur").

18       In this case, the FWS premised the 2012 Biological Opinions on core assumptions  
19 that it knew to be invalid – specifically, that the USFS was implementing the 1996  
20 Standards and Guidelines. Yet the FWS knew that the Standards and Guidelines had not  
21 been implemented in the past, and the FWS likewise knew that the Standards and  
22 Guidelines would not be implemented in the future. Accordingly, those Biological  
23 Opinions are arbitrary and capricious, and must be vacated. In simple terms, it is  
24 irrational for the FWS to issue Biological Opinions on the so-called "*continued*  
25 *implementation*" of the 1996 Standards and Guidelines when the agency was plainly  
26 aware that core aspects of those Standards and Guidelines had *never* been implemented in  
27 the past, and would *not* be implemented in the future.

1           **B.     The 2012 Biological Opinions are premised on an irrational finding**  
2           **regarding MSO population trends that is inconsistent with reality**

3           Since the MSO was listed as a threatened species in 1993, its range-wide  
4           population has declined. SOF ¶¶ 84-91. In 2000, the USFS's best estimate was that the  
5           range-wide population had decreased by between 30% and 40%. SOF ¶ 87. While recent  
6           surveys in previously unsurveyed MSO habitat have resulted in an increase in the number  
7           of known MSO sites, the FWS has cautioned that "an increase in abundance cannot be  
8           inferred from these data." SOF ¶ 91. In fact, the FWS recently acknowledged that the  
9           downward trend in MSO population continues. According to the FWS's 2012 Revised  
10          Recovery Plan, available data as to population trends of the MSO "suggest that most  
11          populations have declined slightly in the recent past or are still declining." SOF ¶¶ 85-86.  
12          Likewise, the USFS plainly admits that the MSO population is declining in at least one  
13          national forest: the Apache-Sitgreaves National Forest. SOF ¶ 89.

14          Contrary to all the available evidence, each of the 2012 Biological Opinions states  
15          as follows in explaining its "no jeopardy" conclusions:

16                 Although population trend monitoring has not occurred for the MSO, our  
17                 records indicate no decline in the MSO population based upon an increase  
18                 in known PAC numbers since the MSO was listed.

19          SOF ¶ 92. This statement is irrational, arbitrary, and capricious for two reasons. First,  
20          the evidence available to the USFS and the FWS – as set out above – actually shows  
21          declining MSO populations, and the FWS's statement that "our records indicate no  
22          decline" is simply inconsistent with all the evidence. Second, the Biological Opinions'  
23          suggestion that an increase in population can be inferred from an increase in known PAC  
24          sites is expressly contradicted by another statement in the Biological Opinions to the  
25          effect that "an increase in the abundance" in MSO populations "cannot be inferred" from  
26          "[t]he increase in known MSO sites" since that increase "is mainly a product of new  
27          MSO surveys being completed within previously unsurveyed areas." SOF ¶ 91.

28          "A Biological Opinion is arbitrary and capricious if it fails to consider the relevant  
factors and articulate a rational connection between the facts found and the choice made."

1 *Center for Biological Diversity*, 698 F.3d at 1121 (internal citations omitted). A “no  
2 jeopardy” Biological Opinion that fails “to support [the no jeopardy] conclusion with  
3 adequate evidence or analysis . . . is arbitrary and capricious.” *Conservation Council for*  
4 *Hawaii v. National Marine Fisheries Service*, 97 F.Supp.3d 1210, 1232 (D. Hawaii  
5 2015). Moreover, a Biological Opinion which fails to account for acknowledged  
6 population declines in its jeopardy analysis does not satisfy the requirements of the ESA.  
7 *Alaska v. Lubchenco*, 723 F.3d 1043, 1052 (9<sup>th</sup> Cir. 2013). In this case, the 2012  
8 Biological Opinions incorporate “no jeopardy” conclusions that are irrationally based on  
9 an erroneous factual premise that is inconsistent with the evidence. The best available  
10 scientific information available to the FWS clearly shows range-wide declines in MSO  
11 populations, but the FWS chose to disregard this evidence in order to reach the “no  
12 jeopardy” conclusions. There is no rational connection in this case between the  
13 population trend evidence available to the FWS and the no jeopardy conclusions of the  
14 2012 Biological Opinions. For this reason, the 2012 Biological Opinions are arbitrary  
15 and capricious, and must be vacated. *Wild Fish Conservancy v. Salazar*, 628 F.3d 513,  
16 525-29 (9<sup>th</sup> Cir. 2010) (when the population trend of a listed species is declining, a  
17 Biological Opinion that fails to explain why a “no jeopardy” conclusion is appropriate  
18 despite that decline is arbitrary and capricious).

19 **C. The FWS failed to provide any explanation for its decision to issue**  
20 **eleven separate Biological Opinions assessing the impacts of USFS**  
**timber management activities**

21 The FWS and the USFS have consistently taken the position that land managers  
22 must manage the MSO on a landscape scale – in order to assure habitat connectivity and  
23 avoid habitat fragmentation – in light of the fact that gene flow amongst and between  
24 *discreet MSO populations is important to the survival of the species. SOF ¶¶ 76-83.*  
25 Reflecting the recognized need for a landscape-level range-wide management approach,  
26 the FWS’s 1996 and 2005 Biological Opinions were regional in scope, and assessed the  
27 MSO impacts of all USFS timber management activities across the MSO’s entire range in  
28

1 Arizona and New Mexico national forests. SOF ¶¶ 47-48. In contrast, the 2012  
2 Biological Opinions depart from the regional approach, and assess the MSO impacts of  
3 USFS management activities on a forest-by-forest basis. SOF ¶ 49.

4 The FWS acknowledges that the 2012 Biological Opinions adopt a new analytical  
5 framework for assessing the MSO impacts of USFS management activities. Each of  
6 those Biological Opinions admit that “[a] distinct change from the [previous iterations of  
7 the Biological Opinions] is that this consultation will be . . . organized according” to  
8 national forests. *Id.* However, the FWS provides no explanation or justification  
9 whatsoever for this significant change in analytical approach.

10 In a case like this one, where the FWS departed from “its long-standing practice”  
11 of issuing a region-wide Biological Opinion assessing the MSO impacts of USFS  
12 management actions across the species’ entire range in Arizona and New Mexico, it  
13 “must supply a reasoned analysis indicating that prior policies and standards are being  
14 deliberately changed, not casually ignored.” *Northwest Environmental Defense Center v.*  
15 *Bonneville Power Administration*, 477 F.3d 668, 687 (9<sup>th</sup> Cir. 2007). Where, as here, the  
16 FWS “glosses over or swerves from prior precedents without discussion,” its actions  
17 “cross the line from the tolerably terse to the intolerably mute.” *Id.* at 687-88, *see also*  
18 *Organized Village of Kake v. U.S. Department of Agriculture*, 795 F.3d 956, 966-67 (9<sup>th</sup>  
19 Cir. 2015) (en banc) (to prevent a claim it was acting in an arbitrary or capricious manner,  
20 where an agency changes its policy, the agency must show awareness that it is changing a  
21 policy and give a reasoned explanation for the adoption of the new policy).

22 **D. The 2012 Biological Opinions are arbitrary and capricious because**  
23 **they fail to provide any meaningful analysis of climate change issues**

24 The USFS’s MSO experts have concluded that climate change “may be the biggest  
25 issue facing Mexican spotted owls.” SOF ¶ 93-99. One recent study cited in the 2012  
26 MSO Revised Recovery Plan concludes that climate change impacts are associated with a  
27 78% to 93% probability that MSOs will go extinct in Arizona and New Mexico national  
28 forests by the end of the century. SOF ¶ 97. For this reason, it is important that the



1 USFS's management of the MSO incorporate climate change concerns, including the  
2 necessity of conserving future MSO habitat in moister and cooler habitat types than are  
3 currently used by the MSO. SOF ¶ 99.

4 Despite the recognized importance of climate change to MSO survival and MSO  
5 management, the 2012 Biological Opinions address climate change in only the most  
6 cursory of fashions. In fact, the 2012 Biological Opinions contain only a very generic  
7 narrative regarding climate change in the United States – and omit any and all analysis of  
8 the particular impacts of climate change on the MSO. SOF ¶ 100. When an agency has  
9 evidence of an important circumstance affecting a listed species – such as climate change  
10 in the case of the MSO – it must rationally and reasonably account for that circumstance  
11 in its jeopardy analysis. Here, it is abundantly clear that the FWS simply punted in its  
12 assessment of climate change impacts – despite the fact that USFS scientists have  
13 determined that climate change is one of the primary threats to the MSO's continued  
14 survival. For this reason, the 2012 Biological Opinion are arbitrary and capricious.

15 **E. The 2012 Biological Opinions contain no meaningful analysis of the**  
16 **cumulative effects associated with tribal timber management programs**

17 Pursuant to the ESA, “agencies are required to evaluate the cumulative effects on a  
18 listed species . . . during formal consultation.” *Conservation Congress v. U.S. Forest*  
19 *Service*, 2012 WL 2339765 at \*12 (E.D. Cal. 2012) *citing* 50 C.F.R. § 402.14(g)(3)-(4).  
20 The “cumulative effects” sections of the 2012 Biological Opinions do not satisfy the  
21 mandatory statutory requirement since those sections are nothing more than boilerplate  
22 cut-and-paste paragraphs from the 2005 Biological Opinion, and contain no meaningful  
23 analysis of “cumulative effects.” SOF ¶¶ 57-62. Indeed, the inclusion of the “cumulative  
24 effects” section was an afterthought, as the authors of the Biological Opinions forgot to  
25 include this section during drafting of the Biological Opinions. SOF ¶ 61.

26 In this case, it is plainly obvious on the Administrative Records compiled by the  
27 Federal Defendants that the FWS simply “punted” in connection with the required  
28 assessment of “cumulative effects” associated with tribal timber management programs.

1 Even the deferential “arbitrary and capricious” standard of review requires a rational and  
2 reasonable analysis of “important aspects of the problem,” and that analysis is lacking  
3 from the 2012 Biological Opinions insofar as “cumulative effects” are concerned. For  
4 this reason, the 2012 Biological Opinions must be vacated.

5 **F. The 2012 Biological Opinion are arbitrary and capricious because they**  
6 **fail to incorporate and to assess the best available scientific information**  
**concerning the relationship between MSOs and wildfire**

7 The 2012 Biological Opinions assert that the primary threat to the MSO has  
8 “transitioned from commercial-based timber harvest to stand-replacing wildfire,” and that  
9 “[u]ncharacteristic, high-severity, stand-replacing wildland fire is probably the greatest  
10 threat to the MSO within the action area.” SOF ¶ 110. However, the 2012 Biological  
11 Opinions also candidly – and inconsistently – admit that the FWS “do[es] not know the  
12 extent of the effects of these wildland fires on actual MSO numbers.” SOF ¶ 111 *see also*  
13 SOF ¶ 112 (“we have no data on long-term effects of these fires on occupancy patterns or  
14 on components of MSO fitness such as survival and reproduction”). Furthermore, the  
15 FWS admits that its unsubstantiated conclusion as to the threat posed by wildland fires is  
16 hypothetical, at best, as it acknowledges in the 2012 Biological Opinions that “MSOs  
17 appear to be somewhat resilient to wildfire, at least in the short term.” *Id.*

18 In fact, the best available scientific information concerning MSO response to fire  
19 indicates that MSOs thrive in a post-fire environment, and this effect has been observed  
20 in areas that burned at high severity more than seven years previously. SOF ¶¶ 106-09.  
21 At the time that the FWS authored the 2012 Biological Opinions, the USFS had  
22 commissioned time-series survey reports of two areas on the Coronado National Forest  
23 that had partially burned at high severity. SOF ¶¶ 107-09. Both of those reports showed  
24 that MSO reproduction in severely burned areas is actually higher than MSO reproduction  
25 outside of those areas, even seven years after the severe fires burned through the survey  
26 areas. *Id.* In preparing the 2012 Biological Opinions, the FWS simply failed to consider  
27 the scientific evidence concerning successful MSO reproduction in severely burned areas.

1 Instead, the FWS makes a conclusory and unsupported assumption – admittedly based on  
2 uncertainty – that wildland fire is the largest threat to MSOs. Since this core assumption  
3 is not supported by the best available scientific information on the issue, the Biological  
4 Opinions are arbitrary and capricious.

5 **G. The 2012 Biological Opinions contain an inadequate discussion as to**  
6 **whether or not the USFS’s *actual* MSO management approach in**  
**Arizona and New Mexico promotes MSO recovery**

7 As noted above, a Biological Opinion that fails to address the impacts of a federal  
8 action on a listed species’ prospects for recovery is arbitrary and capricious. The 2012  
9 Biological Opinions at issue in this lawsuit do not realistically address how the USFS’s  
10 *actual* MSO management approach promotes MSO recovery, and they must be vacated  
11 for this reason.

12 In previous cases, courts have recognized that “overly flexible adaptive  
13 management may be incompatible with the requirements of the ESA.” *Natural Resources*  
14 *Defense Council v. Kempthorne*, 506 F.Supp.2d 322, 352-53 (E.D. Cal. 2007). In *Greater*  
15 *Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015, 1029 (9<sup>th</sup> Cir. 2011), the Ninth  
16 Circuit held that “it is not enough to invoke ‘adaptive management’ as an answer to  
17 scientific uncertainty,” and that adaptive management approaches to species conservation  
18 efforts under the ESA must set out “specific management responses tied to . . . specific  
19 triggering criteria.” In the absence of such enforceable specifics in an adaptive  
20 management conservation scheme, the FWS “cannot take a full-speed ahead, damn the  
21 torpedoes approach” without running afoul of the ESA’s “‘policy of institutionalized  
22 caution.’” *Id.* at 1030 *quoting Arizona Cattle Growers*, 606 F.3d at 1167.

23 In the case of the Mexican spotted owl, USFS and FWS biologists agree that the  
24 adaptive management approach – first set out in the 1995 MSO Recovery Plan and  
25 incorporated into the Arizona and New Mexico Forest Plans by the 1996 Standards and  
26 Guidelines – has not been implemented in the past and will not be implemented in the  
27 future. SOF ¶¶ 28-32, 37-42, 65-75 *see also* pp. 9-15 above. The agencies have not  
28

1 acquired crucial population trend data to measure MSO response to USFS management  
2 activities and the agencies have not conducted any cause-and-effect experiments that  
3 would provide “empirical data on the effects of thinning and other mechanical forest  
4 treatments on [MSOs].” SOF ¶¶ 65-67, 69-75. The FWS admits that the failure to obtain  
5 all of this essential information “has been clearly noted for years,” but that “no studies on  
6 this topic have been funded to date.” SOF ¶ 67. Indeed, the USFS’s leading MSO  
7 biologist co-authored an article in 2012 in which he discusses the agency’s approach to  
8 MSO management as a “case study” of the *failure* of adaptive management. SOF ¶¶ 69-  
9 74 *see* SOF ¶ 74 (the USFS’s “budget and expertise are not keeping up with progress in  
10 wildlife science, namely the use of modern methods to monitor populations and the need  
11 for experimental studies to realize cause and effect relationships”).

12 In undertaking its jeopardy analysis during a Section 7(a)(2) consultation, the FWS  
13 is “required by regulation to assess not only the impacts of the Forest Service’s action on  
14 the *survival* of [a listed species], but also on its *recovery*.” *Center for Biological*  
15 *Diversity v. Provencio*, 2012 WL 966031 at \*11 (D.Ariz. 2012). “Recovery means more  
16 than just improved status; it means improvements to the point where the species may be  
17 delisted.” *Id.* at \*12. In this case, the 2012 Biological Opinions – premised as they are on  
18 the FWS’s irrational assumptions regarding the USFS’s implementation of the 1996  
19 Standards and Guidelines and on the FWS’s view on MSO population trends which runs  
20 contrary to the evidence – simply fail to establish that the FWS adequately assessed how  
21 *actual* USFS management actions will affect the MSO’s prospects for recovery.

22 When viewed in this light, it is clear that the 2012 Biological Opinions are “little  
23 more than an analytical sleight of hand.” *National Wildlife Federation*, 524 F.3d at 933.  
24 They purport to assess an adaptive management approach towards MSO conservation and  
25 recovery which is *not* being implemented. “The ESA requires a more realistic, common  
26 sense examination” of USFS management activities affecting the MSO. *Id.* At bottom,  
27 the notion that the USFS is implementing the adaptive management program embodied in  
28

1 the 1995 MSO Recovery Plan and in the 1996 Standards and Guidelines is nothing more  
2 than smoke and mirrors – and the Federal Defendants have both admitted as much. For  
3 this reason, WEG respectfully submits that this Court must conclude that the FWS  
4 conducted an irrational, arbitrary, and capricious assessment of MSO recovery in the 2012  
5 Biological Opinions, and must further conclude that the USFS’s reliance on the 2012  
6 Biological Opinions is likewise arbitrary and capricious.

7 **H. The Incidental Take Statements of the 2012 Biological Opinions are**  
8 **invalid**

9 The Incidental Take Statements in the 1996 and 2005 Biological Opinions set a  
10 maximum amount of incidental take that could occur as a result of USFS management  
11 activities. SOF ¶¶ 53-54. This amount was a “hard cap,” and exceeding the set level of  
12 take set out in the Biological Opinions triggered a requirement for re-initiation of Section  
13 7(a)(2) consultation. In contrast, the Incidental Take Statements incorporated into the  
14 2012 Biological Opinions allow for open-ended and limitless take so long as a certain  
15 amount is not exceeded each year. SOF ¶ 55. Furthermore, the Incidental Take  
16 Statements of the 2012 Biological Opinions do not account for the fact that MSOs use  
17 habitat without any regulatory protection while they are dispersing. Accordingly, the  
18 incidental take of dispersing owls is not captured by the take limits of the Incidental Take  
19 Statements because those statements only account for the incidental take of MSOs that  
20 occurs in Protected Activity Centers. SOF ¶¶ 101-05. Likewise, the Incidental Take  
21 Statements incorporated into the 2012 Biological Opinions do not account for the fact that  
22 MSOs appear to shift about the landscape and do not remain in their “assigned”  
23 Protective Activity Centers. SOF ¶ 113. As is the case with dispersing owls, incidental  
24 take of these “shifting” owls is simply not tallied under the 2012 Biological Opinion’s  
25 Incidental Take Statements. The failures of the Incidental Take Statements (1) to set a  
26 hard cap on the amount of incidental take and (2) to account for *all* incidental take of  
27 MSOs renders the Incidental Take Statements arbitrary and capricious.

28 One of the important functions of an Incidental Take Statement is to set a limit on

1 the amount of incidental take that may occur as the result of an action, so that ESA  
2 Section 7(a)(2) consultation may be re-initiated in the event that the maximum level of  
3 take is exceeded. *Oregon Natural Resources Council v. Allen*, 476 F.3d 1031, 1038-39  
4 (9<sup>th</sup> Cir. 2007). An Incidental Take Statement that does “not set a clear standard for  
5 determining when the authorized level of take had been exceeded” is arbitrary and  
6 capricious. *Id.* at 1039. Here, where the Incidental Take Statements allow for limitless  
7 take, so long as a certain amount is not exceeded each year, the required “clear standard”  
8 does not exist and the Incidental Take Statements are arbitrary and capricious.

9 Additionally, the Ninth Circuit has held that “the permissible level of take ideally  
10 should be expressed as a specific number.” *Id.* at 1037. In this case, the FWS does not  
11 set a specific level of MSOs that may be incidentally taken, but rather expresses the take  
12 limit as a percentage of Protected Activity Centers that can be modified by USFS  
13 management actions. However, the use of “a surrogate is permissible” only in those  
14 instances where “no number may be practically obtained.” *Id.* at 1038. Additionally, if  
15 an Incidental Take Statement uses a surrogate for a level of take, it “must articulate a  
16 rational connection between the surrogate and the taking of the species.” *Wild Fish*  
17 *Conservancy*, 628 F.3d at 531. In this case, where the surrogate does not capture for the  
18 incidental take of dispersing MSOs and MSOs that have shifted outside of their Protected  
19 Activity Centers, the use of the selected surrogate is impermissible, and the Incidental  
20 Take Statements are invalid.

21 **VII. THE USFS’S RELIANCE ON AN INVALID BIOLOGICAL OPINION**  
22 **IS A VIOLATION OF ITS SUBSTANTIVE DUTIES UNDER**  
23 **ESA SECTION 7(A)(2) AND ESA SECTION 9**

24 As noted at this outset of this memorandum brief, the ESA imposes both  
25 procedural and substantive duties on federal agencies. One of the core substantive duties  
26 that the ESA imposes on action agencies – such as the USFS in this case – is the ESA  
27 Section 7(a)(2) duty to avoid jeopardy to listed species. 16 U.S.C. § 1536(a)(2). The  
28 Ninth Circuit holds that an action agency violates this substantive duty when it relies on

1 an invalid Biological Opinion:

2 ESA Section 7 imposes on [a federal agency] a substantive duty to ensure  
3 that its operations are not likely to jeopardize the continued existence of  
4 [listed species]. Arbitrarily and capriciously relying on a faulty Biological  
5 Opinion violates this duty.

6 *Wild Fish Conservancy*, 628 F.3d at 532 (internal quotations omitted). “In particular, an  
7 agency cannot meet its section 7 obligations by relying on a Biological Opinion that is  
8 legally flawed or by failing to discuss information that would undercut the opinion’s  
9 conclusions.” *Center for Biological Diversity*, 698 F.3d at 1127-28.

10 As explained above, the FWS’s 2012 Biological Opinions are legally flawed in  
11 various respects, and are arbitrary and capricious. Accordingly, the USFS does not meet  
12 its substantive obligation under ESA Section 7(a)(2) to avoid jeopardy to the MSO when  
13 it relies on those Biological Opinions to establish ESA compliance. To the contrary, the  
14 USFS’s reliance on the 2012 Biological Opinions is arbitrary and capricious, and  
15 constitutes a violation of the USFS’s ESA Section 7(a)(2) substantive duty.

16 Another core substantive duty is the duty to avoid all “take” of listed species,  
17 except for that incidental take which is expressly contemplated by and authorized by an  
18 ITS. 16 U.S.C. § 1538. As explained above, the Incidental Take Statements that are  
19 incorporated into the 2012 Biological Opinions are invalid. Accordingly, the USFS is not  
20 exempt from the ESA’s take prohibition and all incidental take of MSOs that occurs in  
21 connection with the USFS’s management activities is unauthorized and illegal.

## 22 **VIII. CONCLUSION**

23 As described above, the FWS’s 2012 Biological Opinions are “little more than an  
24 analytical sleight of hand” drafted to justify no jeopardy conclusions. *National Wildlife*  
25 *Federation*, 524 F.3d at 933. For this reason, they are arbitrary, capricious, and invalid,  
26 and the USFS’s reliance on the 2012 Biological Opinions is likewise arbitrary, capricious,  
27 and invalid.  
28

1 Dated: March 31, 2016

Respectfully submitted,

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6  
7  
8 **CERTIFICATE OF SERVICE**

9  
10 I hereby certify that on March 31, 2016, I electronically filed the foregoing  
11 PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court via  
12 the CM/ECF system, which will send notification of such to the attorneys of record.  
13  
14  
15

16 /s/ Steven Sugarman  
17 Steven Sugarman  
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